

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Amendments to Rules of Practice

Docket No. RM2019-13

PUBLIC REPRESENTATIVE COMMENTS

(November 1, 2019)

I. INTRODUCTION

Pursuant to the Commission's September 13, 2019 order establishing this rulemaking docket, the Public Representative hereby responds to the Commission's request for Comments.¹ The Commission established this docket to reorganize the order of appearance of its regulations in Chapter III of title 39 of the Code of Federal Regulations (CFR). Order No. 5229 at 1.

II. BACKGROUND

The Commission's Rules and Regulations in the CFR are contained in Chapter III-Postal Regulatory Commission of title 39.² Chapter III is currently divided into 20 parts, variously numbered part 3000 through part 3060 with parts 3061-3099 being reserved. All parts have section numbers and some sections are consolidated into subparts.

*Impact of the PAEA.*³ The PAEA revised and added statutory provisions to title 39 of the United States Code in 2006, thereby significantly altering the Commission's duties

¹ Notice of Proposed Rulemaking to Amend the Commission's Rules of Practice and Procedure and to Reorganize its Regulations in the Code of Federal Regulations, September 13, 2019, (Order No. 5229).

² Only one other chapter is contained in title 39, Chapter I—United States Postal Service.

³ Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006).

and responsibilities. Order No. 5229 summarizes the history of the Commission's modifications to its rules in response to the PAEA. Order No. 5229 at 6-8.

In response to the PAEA's new and revised statutory provisions in title 39, the Commission deleted several subparts and added several new parts to its regulations to conform to PAEA requirements.⁴ Eight additional parts of the regulations were revised or added at various times with *no* particular logical organization in mind. *Id* at 8.⁵ Four remaining parts not related to procedures for ongoing proceedings are administrative in nature. Two involve the Commission, part 3000 (Employee Standards of Conduct) and part 3002 (Organization) and two involve accessing information from the Commission, part 3003 (Privacy Act rules) and part 3004 (Freedom of Information Act rules). These four parts would be renumbered and placed into two Subchapters but remain at the beginning of the rules.

Purpose of rulemaking. This proposed rulemaking would accomplish two primary purposes. One purpose is to amend, by updating and revising, part 3001 (Rules of Practice and Procedure) of Chapter III to conform the rules to the primary current Commission procedural practice of conducting notice and comment proceedings rather than "on the record" hearing type proceedings prevalent prior to the PAEA. *Id.* at 8-9. Thus, the rulemaking proposes to fully revise and update current part 3001 primarily into newly designated part 3010 as the General Rules of Practice for Proceedings before the Commission.⁶

⁴ For instance, since the PAEA passed in 2006, part 3001 has been revised by several orders removing subparts B, C and E through L of part 3001, leaving only subparts A containing general rules and D containing rules for Nature of Services cases. In addition, seven other parts to implement the PAEA have been added to the rules: part 3010 (market dominant pricing), part 3015 (competitive pricing), part 3020 (changing product lists), part 3035 (market tests), part 3050 (reporting requirements), and 3030 (filing of complaints), and 3025 (appeals of post office closings). Order No. 5229 at 7-8.

⁵ Part 3005 (Compelling Production of Information by the Postal Service, part 3008 (Non-public Materials), part 3007 (Ex Parte Communications), part 3017 (Procedures Related to Commission Views); part 3031 (Rate or Service Inquiries), part 3032 (Rules for Complaints), part 3055 (Service Performance and Customer Satisfaction Reporting), and part 3060 (Accounting and Tax Rules).

⁶ For this purpose, most of part 3001, except section 3001.43 and subpart D is being consolidated into new Subchapter C as part 3010. Subchapter C would also include current part 3007, Non-public

The second purpose of this rulemaking is to reorganize the various current parts of Chapter III of title 39 by consolidating similar or like-purpose parts into six overarching Subchapters A through F of Chapter III.⁷ In some cases, subparts are also consolidated. The proposed rules contain 21 parts in six Subchapters.

III. PUBLIC REPRESENTATIVE COMMENTS

A. Overall Impact of Proposal

In the Public Representative's view, the proposed structural reorganization inserting Subchapters A through F to overarch the parts of Chapter III, significantly reorganizing part 3001 and making other conforming changes within the new Subchapters is necessary to maintain up to date rules consistent with current technology.

The proposed rules will accomplish the purpose of this rulemaking to reorganize the rules into a more orderly and logical whole by reintegrating rules promulgated since the PAEA. It will also provide the needed update to conform the rules to current practices and it will facilitate the public's use of, and search for, relevant and related Commission rules and regulations and enhance the public's participation in Commission proceedings. *Id.* at 2-3. As the Commission intends, the rules appear to progress through Chapter III from more general rules to more specific rules of interest to particular persons. *Id.* at 1-2.

The broadest and most significant changes to the rules are proposed for current part 3001 (Rules of Practice and Procedure). The Public Representative has reviewed the proposed reorganization and revisions of part 3001 into newly designated part 3010.

materials, part 3008, *Ex parte* communications and part 3005, Procedures compelling production of information by the Postal Service. *Id.* at 14-15, Table III-4. Subpart D of part 3001 is included in Subchapter D with several other renumbered parts. *Id.* at 16, Table III-5.

⁷ The proposed new Subchapters of Chapter III are: A--The Commission; B--Seeking Information from the Commission; C--General Rules of Practice for Proceedings Before the Commission; D--Special Rules of Practice for Specific Proceeding Types; E--Regulations Governing Market Dominant Products, Competitive Products, Products Lists, and Market Tests; and F--Periodic Reporting, Accounting Practices, and Tax Rules. *Id.* at 10, Table III-1.

The Public Representative does not object generally to the extensive revisions to update part 3001, subpart A (new part 3010) Rules of Practice and Procedure, for proceedings before the Commission. Very few significant revisions have been made to parts other than part 3001. Generally, only a few headings and section numbers other than conforming section number changes have been proposed.

B. Public Representative Comments for Specific Changes are Limited.

The Public Representative has only a few Comments on the proposed rules. The Comments below suggest some minor changes to certain proposed rules and some edits to the proposal. In the end, there are a variety of choices available for the organization and consolidation of the Commission's rules of practice and procedure. It is difficult to contend one form of organization is significantly more desirable than another organization. In the end, the final structure of the rules largely depends upon the Commission's own staffing and administrative requirements and the desirability for a certain degree of administrative efficiency and the need to ensure due process as well as facilitating public understanding and application of the rules. The proposed rules continue to expressly provide for fairness and due process for parties to proceedings consistent with the Administrative Procedure Act and the PAEA. The proposed rules also ensure interested persons and participants the critical opportunity to be heard in a timely fashion with the aid of newer technologies.

The proposal to relocate the rules regarding "on the record" hearings to a later position in the rules is consistent with more recent Commission practice and the legislative intent of the PAEA. The proposed rules continue to provide parties the opportunity to seek to present information and evidence necessary in on the record hearings before the Commission or a presiding officer.

One noteworthy aspect of the change in the rules of practice is new part 3010.322(b)(2), *Status of library references*. The proposal eliminates the list of six

categories of library references.⁸ Given the reduced number and size of on the record proceedings at the Commission, the Public Representative does not oppose the simplification of the library reference rules. However, it should be recognized that in large on the record proceedings with multiple parties filing many library references, the system to label library references by Category has been useful to the parties. It enabled parties to organize easily a large number of extensive library reference materials by their relative importance to the issues.

It is also reasonable and logical to move the existing rules for “Changes in the Nature of Postal Services” rules out of part 3001 into a separate renamed part 3020, as “Rules Applicable to Requests for Changes in the Nature of Services” within new Subchapter D, parts 3020-3025. Maintaining the rules for periodic reporting, accounting practices and tax rules together at the end of the rules in new Subchapter F is consistent with their limited applicability in public proceedings and consistent with the more specific nature of the rules applicable to Postal Service reporting.

⁸ *Id.* at 148. The six Categories are: 1. Reporting Systems Material, 2. Witness Foundational Material, 3. Reference Material, 4. Material Provided in Response to Discovery, 5. Disassociated Material, and 6. All Other Material

C. Disposition Table.

A critical tool necessary for users of the new rules and regulations will be the addition of a disposition table cross-referencing all of the new rules with the old rules. Order No. 5229 includes excellent roadmaps in several tables to review the proposed changes for purposes of Comments, but the final Commission order must provide for a complete table or tables cross-referencing the changes in each new or revised part, section and subsection with the old rule numbers. The tables must be readily available to practitioners and the general public participating in future cases who may need to review and reference the Commission's history of particular rules in past cases. Preferably the table will be inserted in the CFR, if feasible, but, if not, as a minimum, inclusion on the Commission's website would be necessary.

D. Proposed Subchapters.

Order No. 5229 proposes six Subchapters, A-F. Order No. 5229 at 10. Each Subchapter contains at least three parts, some parts do not have substantive changes but have updated cross-references within each section. The Public Representative does not oppose the organization of the new Subchapters. The parts consolidated into the Subchapters generally are ordered logically and appear to satisfy the Commission intentions for reorganizing the parts from the more general to the more specific.

However, the proposed title of Subchapter B "Seeking Information from the Commission" might be modified. This Subchapter includes newly named part 3007 "Commission meetings" which states the public is not permitted to participate in the meetings. The public is not seeking information at meetings so much as obtaining or gathering information. This Subchapter B also includes proposed part 3005 Privacy act rules and part 3006 Public records and freedom of information act. The Public Representative suggests that the title of the Subchapter B should be modified to

emphasize a more positive user-friendly outcome, “Gathering Information at the Commission.”

E. Proposed Reorganization of Parts.

1. Proposed Part 3010 Rules of Practice and Procedure.

a) Proposed Section 3010.106 Presiding officers.

Proposed section 3010.106(c) provides for authority to the presiding officer to, “Regulate the course of a proceeding before the Commission, including ruling on all matters not specifically reserved for the Commission, either orally during a hearing or by issuing written presiding officer rulings.” Order No. 5229 at 88. This proposed section omits the limitation in current rule 3001.23(a)(7) which prohibits presiding officers, “before their intermediate decision, to dispose of motions made during the hearings to dismiss proceedings, or other motions which involve a final determination of the proceeding.”

While motions either to dismiss a proceeding or seeking a final determination of a proceeding before the presiding officer’s decision are rare, presiding officers should continue to lack authority to dispose of such motions prior to their intermediate decision. This would serve to avoid premature termination of proceedings without fully developing evidence relating to the underlying issues before the case rises to the Commission level for a final decision.

The Public Representative recommends inserting into proposed section 3010.106(c) the omitted language from current section 3001.23(a)(7) that prohibits presiding officers before the intermediate decision from disposing of motions to dismiss proceedings or which involve a final determination of the proceeding.

b) Proposed Section 3010.301 Scheduling order.

Proposed section 3010.301 presents a detailed description of 17 scheduling steps to be considered for a scheduling order by the Commission or the presiding officer in a matter before the Commission. For instance, section 3010.304(b)(1) provides for a deadline for discovery on proponent's direct case. The section further provides for a time and date for a hearing on the proponent's direct case and other necessary procedural steps for the proponent's case. Section 3010.304(b)(2-17). *Id.* at 126-7.

However, the list of procedural steps omits any reference or provision to conclude discovery, designations, witness testimony or hearings for cross-examination of witnesses *supporting* the proponent's direct case. Scheduling step (5) provides for "A deadline for parties other than the proponent to file testimony in rebuttal to the proponent's direct case." Other proposed steps provide for dates related to a rebuttal case, but a rebuttal case is not a case in support of the proponent's case. Frequently, in hearings on the record, parties present witnesses and evidence in support of the proponent's case. The current rules cover this problem by stating, "The case-in-chief of participants other than the proponent shall be in writing and shall include the participant's direct case and rebuttal, if any, to the initial proponent's case-in-chief. 39 CFR 3001.30(e)(1). Language identical to that in section 3001.30(e)(1) is proposed for section 3010.321(g)(1), but the policy it represents is not reflected in the 17 scheduling steps listed for consideration in section 3010.304. *Id.* at 126-7, 140.

Language should be included in the scheduling order section recognizing the possibility that parties supporting the proponent may need an opportunity to hear the proponent's case before preparing their own case. Language should also be added for considering time for parties supporting proponent's case to file testimony and other evidence as well as to allow parties the opportunity in the schedule to fully rebut witnesses and evidence presented by those who support proponent's case.

c) Proposed Section 3010.321 Hearings.

Within part 3010, subpart F, Proceedings with an Opportunity for a Hearing on the Record, section 3010.321 regarding hearings is proposed. Subsection (e)(3) *Order of Presentation* of that section 3010.321 includes the provision that after the order for presentation of parties' witnesses, a party may present their preferences for the order of appearance to the Commission, the presiding officer orally in a hearing, by filing a "notice, or by informally contacting the Commission's General Counsel, prior to the scheduled hearing date." *Id.* at 139.

There are two issues presented here. First, the filing of a notice without motion can leave the issue for modification of the scheduling order unresolved and the presentation schedule uncertain. There is no procedure for response by the Commission or a presiding officer during a hearing to respond to a Notice filed by a party. Requests for action by another are normally expected to be presented by motion rather than notice.

Second, if a party discusses its preferences for scheduling changes with the General Counsel, the interests of others may not be represented. While the General Counsel who is not a party to a proceeding (although the Public Representative is a party) has some authority as advisor to the Commission to influence a revision of a Commission scheduling order, the General Counsel would not normally have authority for *ex parte* input to influence the Commission or the presiding officer to modify an order of presentation without concurrence of all parties or with the opportunity for input from those parties who may be affected.

The Public Representative proposes a change in the notice option to provide for a motion rather than a notice. Also, the Public Representative proposes deleting the option to informally contact the General Counsel to discuss *ex parte* a preference for a change in a scheduling order unless the other parties concur in the discussion.

2. Proposed changes to names of parts of the rules

The Commission proposes to change the names of several parts of the rules. The purpose is to not only update and improve the logic of the rules, but to make them more user friendly for purposes of searching for specific types of rules. The Public Representative proposes below additional modifications to the names of several parts of the rules to facilitate browsing and searching for rules applicable to a particular circumstance. Although some suggestions would change part names that are not otherwise proposed for revision, this proceeding offers an excellent opportunity to fashion rule's headings to be more user friendly. The Comments below are directed to the new part numbers in some of the new Subchapters.

a) Part 3007 (Subchapter B)

Change the proposed title of part 3007.100 (currently section 3001.43) from "Public Attendance at Commission Meetings" to "Public Access to Commission Meetings." The Commission's proposed heading for section 3007.100, Public Attendance a Commission meetings, does not fully capture the breadth of the rule. The Public Representative suggests an alternative that implicitly recognizes the rule does not only involve the physical attendance at Commission meeting but also access to documents such as certain votes, meeting transcripts and other documents where meetings may be closed to the public.⁹ Order No. 5229 at 13-4, 69-79.

b) Parts 3020-3025 (Subchapter D)

Part 3020 (currently part 3001, subpart D). Add "Postal Service" to the proposed title to read "Rules Applicable to Postal Service Requests for Change in the Nature of

⁹ It should be noted that Table III-4 in Order No. 5229 lists current part 3001 as the source of proposed part 3010. Rather, the source should be listed as "Part.3001, except 3001.43." Section 3001.43 relates to the Commission Meetings section being moved to Subchapter B, part 3007. Also, unlike other tables, Table III-3 omits the proposed name of part 3007, "Commission Meetings."

Postal Services.” This would revise the current title of this part so as to quickly indicate to readers that this rule does *not* serve as a potential procedure for the public to request changes in services of the Postal Service. Order No. 5229 at 15-6. 196.

Part 3022 (currently part 3030). Add “by Interested Persons” to the proposed title to read “Rules for Complaints by Interested Persons.” This would more quickly indicate to readers the part’s availability to a broad range of persons who need only be interested in certain issues rather than an availability to only specific types of persons. *Id.* at 15-6, 222.

Part 3023 (currently part 3031). Add “by the Public about Postal Service Activity” to the proposed title to read “Rules for Rate or Service Inquiries by the Public about Postal Service Activity.” This would assist browsing readers by quickly indicating this part is designed for the public to make inquiries (not the Commission) and about the Postal Service and not the Commission. *Id.* at 15-6, 225.

Part 3025 (currently part 3017). Add “to the Secretary of State” to the proposed title to read “Procedures Related to Commission Views to the Secretary of State.” This would quickly indicate to readers without having to refer to the text of the rule that it involves only a rule of limited scope for cases where Commission views to the Secretary of State are involved. The current title suggests the rule might otherwise apply to views on any other person or on any one of several potential subjects. *Id.* at 15-6, 57.

c) Part 3040 (Subchapter E)

Part 3040 (currently part 3020). Add “and the Mail Classification Schedule” to the proposed title to read “Product Lists and the Mail Classification Schedule.” Several significant sections of proposed part 3040 relate to the Mail Classification Schedule (MCS). The MCS is a major aspect of the Commission’s oversight and is referenced frequently. Because Product Lists do not necessarily indicate the presence of the MCS

to a reader, the MCS should be prominently named in the title of the relevant part 3040.¹⁰ *Id.* at 16-7, 236.

d) Part 3050 (Subchapter F)

The part numbers consolidated into Subchapter F are not being changed. The Public Representative proposes the addition to proposed part 3050 (also currently part 3050) “by the Postal Service” to the proposed title of part 3050 to read “Periodic Reporting by the Postal Service.” This would quickly clarify that part 3050 does not relate to reporting by the Commission to Congress, the public, mailers or parties other than the Postal Service. *Id.* at 18.

I. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission’s consideration.

Respectfully submitted,

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¹⁰ The MCS is so significant that it could reasonably be named in the title of Subchapter E to assist in locating the MCS rules.